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Case No. 94-1421

IN THE

Supreme Court of the United States

October Term 1994

ERNEST D. SUGGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Respondent would restate the questions presented as follows:

I.

SHOULD THIS COURT GRANT THE WRIT TO REVIEW THE FLORIDA SUPREME COURT'S FINDING ON THE UNIQUE FACTS OF THIS CASE THAT PETITIONER VOLUNTARILY AGREED TO ACCOMPANY POLICE TO THEIR SUBSTATION FOR FURTHER QUESTIONING, IN CONFORMITY WITH THIS COURT'S PRECEDENTS, INCLUDING *DUNAWAY v. NEW YORK*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), AND *FLORIDA v. ROYER*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)?

II.

SHOULD THIS COURT GRANT THE WRIT TO REVIEW THE FLORIDA SUPREME COURT'S FINDING THAT PETITIONER VOLUNTARILY CONSENTED TO A SEARCH OF HIS HOME?

III.

SHOULD THIS COURT GRANT THE WRIT TO ADDRESS A FRUIT-OF-THE-POISONOUS-TREE ISSUE NOT REACHED OR ADDRESSED BY THE COURT BELOW?

IV.

SHOULD THE COURT ADOPT A PER SE OR BRIGHT LINE RULE THAT A SUSPECT NOT UNDER ARREST MUST BE SPECIFICALLY ADVISED OF HIS RIGHT TO LEAVE BEFORE HE CAN VALIDLY CONSENT TO SEARCH, IN CONTRAVENTION OF THIS COURT'S CONSISTENT ADHERENCE TO A TOTALITY-OF-THE-CIRCUMSTANCES APPROACH TO EVALUATING THE VOLUNTARINESS OF CONSENTS?

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OPINION BELOW

The opinion below is published at 644 So.2d 64 (Fla. 1994). Petitioner's Appendix A appears to be an accurate reproduction.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement as to the Constitutional provisions involved.

STATEMENT OF THE CASE

Respondent does not accept Petitioner's statement of the case as being sufficiently accurate and complete, and offers the following statement of the case.

The victim, Pauline Casey, was the sole employee working at the Teddy Bear Bar in Walton County, Florida, on the evening of August 6, 1990. Late that evening, the bar was found abandoned.Its front door was ajar and only some coins were left in the register; all the bills were missing. Although the victim had disappeared, her purse and keys were still inside the bar, and her car was parked outside. (R2220-2226).

After investigation, the police learned that the victim had last been seen alive shooting pool with the only customer left in the bar. (R 2684-85). After obtaining a description of that customer and his vehicle, a BOLO was issued (R 870-71).

Early in the morning of August 7, a sheriff's deputy noticed a speeding vehicle in front of him (R 854). He testified:

> The speed limit was fifty-five prior to going on by the 331 mart, but it dropped down to thirty-five in the construction going on at the bridge. And my patrol car, I was doing sixty, and I still wasn't gaining on the vehicle even across the bridge. I speeded up to sixty-five and the vehicle was still pulling away from me. And that's the reason I was in pursuit, more or less, to see why he was speeding. I didn't know who it was at that time. I was trying to get up there to it so I could see who it was and stop it from speeding. (R 863).

About a mile past the bridge, the vehicle made a u-turn. As it drove toward and past the patrol car, the deputy saw

that the vehicle fit the description in the BOLO (R 854-55). The deputy turned on his patrol vehicle's blue flashing lights and pulled over the speeding vehicle, which was being driven by the Petitioner (R 856-57). The deputy asked for and obtained Petitioner's driver's license, and told Petitioner to "sit where you are" until "some more officers" came over (R 856). The deputy then returned to his patrol car to "call in" Petitioner's driver's license.

The Petitioner, meanwhile, exited his vehicle, approached the deputy and stated, "I've got to tell you...I'm on probation...[for] murder." The deputy placed his hand on his gun — without drawing it — and ordered Petitioner back to his car (R 857).

Within three minutes of the time Petitioner's vehicle was first spotted, investigators with the Walton County Sheriff's office arrived at the scene of the stop (R 872). At this point, they did not know Casey was dead, but they did suspect an abduction and a robbery (R 874, 889). Officer Sunday asked Petitioner "if he had no objections, would he come to the substation and talk to us" about an "incident" at the Teddy Bear Bar (R 873). Petitioner answered, "sure"; he "agreed to come to the substation." (R 873). Sunday testified that Petitioner was not under arrest, was not in custody, and was free to leave (R 873, 876). Sunday also asked Petitioner that "if he didn't mind anyone driving his vehicle, there was someone there that could." (R 887-88). Petitioner not only agreed (R 907), he "actually started showing me how to operate the vehicle...There was some type of catch or something" (R 888).

Petitioner rode to the substation in a patrol car (R 888). Officer Mann drove Petitioner's vehicle to the substation, locked it and carried the keys inside (R 908). He may or may not have retained custody of the keys (R 890). In any event, he and Officer Sunday interviewed Petitioner. They told

him that they were "investigating a missing bartender from Teddy Bear's Bar and that...he matched the description of the last person that was seen at the Teddy Bear bar." (R 875). Petitioner admitted being at the bar and talking to Casey (R 876, 900), but claimed she was "fine" when he left. The investigators asked him if he would object to a search of his home (R 875) to "eliminate" him as a possible suspect regarding the missing woman (R 880). Petitioner expressed a concern that there were guns in his home and that because he was on parole, he was afraid of what might happen if guns were found. (R 879). After reaching an agreement with the officers not to charge him with the illegal possession of any weapons in his home, Petitioner signed a consent to search his home (R 876, 880, 897).

Petitioner's own testimony establishes not only that he was basically familiar with his rights (because he had "been through the system" in Alabama, having been convicted of murder and assault with intent to murder), but that he *knew* he did not have to sign a consent to search his home (R 937). His knowledge of his rights is "why I wouldn't sign it until they came back and told me they didn't care about anything in the house except the girl" (R 936).

During the consent search of Petitioner's home, the police found almost two hundred dollars in small denomination bills in a bathroom sink. (R 2739, 2740). Meanwhile, another officer, using a photograph of a tire print from Petitioner's vehicle (which was not otherwise searched until after his arrest), found the victim's body twenty-five feet from a dirt road three to four miles from the bar where she had worked.

Petitioner was arrested after the body was found. Search warrants were obtained and police discovered other evidence, summarized in the opinion below, additionally connecting Petitioner to the murder:

> ...one of the three known keys to the bar and a beer glass similar to those used at the bar were found in the bay behind Suggs' home; the victim's palm and fingerprints were found in Suggs' vehicle; and a serologist found a bloodstain on Suggs' short that matched the victim's blood. Additionally, after his arrest, Suggs told two cellmates that he killed the victim.

Suggs v. State, 644 So.2d 64, 66 (Fla. 1994).

Petitioner's motion to suppress was heard prior to trial (R 849-948) (Petitioner's Appendix D). Petitioner's attorney conceded the validity of the initial stop, stating "we're not attacking the stop.... we believe that the officers had a reasonable suspicion to conduct an investigative stop." (R 942-43). He argued, however, that the trip to the substation "was not a voluntary detention, nor was there probable cause to detain him." Therefore, he argued, the burden was on the State to prove "beyond a reasonable doubt" that Petitioner's consent to search was "voluntary" (R 943).

The trial court denied the motion to suppress. The court found that the initial stop of Petitioner's vehicle was a valid traffic stop for speeding and/or a valid investigative stop; that Petitioner was not placed under arrest at the scene; that Petitioner consented to accompany the officers to the station; that even if the trip to the substation was nonconsensual, Petitioner's conduct at the substation created a valid waiver; and that Petitioner voluntarily consented to the initial search of his home. (Petitioner's Appendix C).

The denial of Petitioner's motion to suppress was affirmed on appeal. The Florida Supreme Court held:

> Suggs next contends that the trial judge erred by denying Suggs' motion to suppress the evidence found at his home, claiming that his initial deten-

> tion by police was illegal and that the consent form he signed agreeing to allow the law enforcement officers to search his home was improperly obtained. We disagree. At the time Suggs was stopped, no one even knew the victim was dead; the officers were looking for Suggs simply to determine if he knew the victim's whereabouts. Additionally, Suggs was legitimately stopped by the officer because he was speeding. Further, Suggs voluntarily agreed to accompany the officer to the station, even going so far as to show another officer how to drive his vehicle. Finally, once at the station, Suggs not only voluntarily agreed to allow officers to search his home — he did so only after reaching an agreement with the officers not to charge him with the illegal possession of weapons that he kept at his home.

Suggs v. State, supra, at 68.

The affirmance of the denial of Petitioner's motion to suppress is the subject of the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I

THIS COURT SHOULD NOT GRANT THE WRIT TO REVIEW THE FLORIDA SUPREME COURT'S FINDING ON THE UNIQUE FACTS OF THIS CASE THAT PETITIONER VOLUNTARILY AGREED TO ACCOMPANY POLICE TO THEIR SUBSTATION FOR FURTHER QUESTIONING, BECAUSE SUCH FINDINGS ARE INHERENTLY FACT-BOUND, AND THE FINDING HERE IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS, INCLUDING *DUNAWAY v. NEW YORK,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), AND *FLORIDA v. ROYER,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

Petitioner's argument here has three components. First, he hints — but does not clearly contend — that the initial stop of Petitioner was unjustified. Second, even if justified initially, the scope of the stop, he contends, was expanded unconstitutionally. Third, the Florida Supreme Court's conclusion that Petitioner "voluntarily agreed" to accompany the police to the substation was not supported by the record. Respondent will address these arguments in order.

A.

Initially, Respondent must take issue with Petitioner's assertion that it is "undisputed" that when Petitioner was stopped "the police did not even know that a crime had been committed," and that as a consequence, the Florida Supreme Court "tried to justify Petitioner's stop based upon a claim that he was speeding," even though under Florida law, speeding "does not subject a person to arrest." Petition for Writ of Certiorari at p.8.

Although the police did not know when they issued the BOLO that the victim was dead, they did know that the bar where she was supposed to be working had been abandoned, that almost $200.00 in bills was missing from the cash register and that, while the victim was nowhere around, her car, purse and keys were still at the bar. On these facts, the police had ample justification for concluding that a crime probably had been committed. The further fact that the victim had last been seen alive shooting pool with the Petitioner warranted a reasonable suspicion that petitioner was involved in her disappearance.

Moreover, it is true that speeding is defined as a "non-criminal infraction." Florida Statutes Section 318.14(1). However, police are authorized to issue citations for such noncriminal infractions. Florida Statutes § 318.14(2). It would be nonsensical to interpret Florida law not to authorize traffic stops. *Thomas v. State,* 614 So.2d 468 (Fla. 1993).

In fact, Petitioner's attorney conceded at trial that the initial stop was proper. However, with or without this concession, the initial stop clearly was justified on either of two grounds, i.e., as a valid traffic stop or as a valid investigative stop. *See United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

B.

Of course, the intrusiveness of such a detention must be appropriately limited in scope. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonable suspicion alone will not justify transporting a suspect involuntarily to a police station for questioning. *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); and it is questionable whether reasonable suspicion alone would justify an involuntary detention lasting on hour and a half.

United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).

However, it is clear that law enforcement officers may solicit the voluntary cooperation of citizens in criminal investigations, whether or not that citizen is a suspect. *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Schneck*loth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The evidence and the factual conclusions of the lower courts in this case distinguish it from *Dunaway v. New York, supra,* and *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), which Petitioner contends the Florida Supreme Court overlooked (even though both cases were discussed and argued by both parties on appeal).

The police who transported Dunaway to the station had been ordered to "pick up" Dunaway and "bring him in." *Dunaway v. New York, supra,* 442 U.S. at 203. He would have been physically restrained if he had tried to leave. *Ibid.* Significantly, the trial court determined from the evidence that Dunaway did not accompany the police voluntarily.

The police who transported Royer to their office failed to elicit Royer's agreement to accompany them. *Florida v. Royer, supra* at 494. Moreover, the state conceded at oral argument that Royer would not have been free to leave, *id.* at 496, and the testimony of the officers indicated they would have conducted a search whether Royer agreed to one or not. On this evidence, the Florida Court of Appeals concluded that Royer had not voluntarily consented to accompany the officers or to the search. *Id.* at 495, 503.

In this case by contrast, there was no order to "bring [petitioner] in." There was no testimony that he would have

been physically restrained if he had tried to leave. There has been no concession by the State at any time that Petitioner would not have been free to leave. Moreover, although Petitioner argues to the contrary (Petition for Writ of Certiorari at p. 14), the testimony shows that Petitioner could have driven his vehicle to the station if he had chosen to do so, or he could have driven away if he had chosen not to accompany the police to the substation. He was, as the police officers testified, free to leave. Although there were several officers at the scene, none of them ever drew their weapons, nor was Petitioner ever handcuffed. Within minutes after lawfully stopping the Petitioner, the police asked him if he would come to the substation. He readily assented.

On this record, the Florida Supreme Court agreed with the trial court's determination that Petitioner voluntarily accompanied the police to the substation.

C.

There is no "litimus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop." *Id.* at 506. There will be such "endless variations in the facts and circumstances" of each encounter that it is unlikely that "the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure." *Id.* at 506-07. Thus, this Court has repeatedly deferred to the lower court's factual determinations as to whether or not a defendant has voluntarily consented. *See United States v. Mendenhall, supra,* 446 U.S. at 558 ("while these factors [allegedly indicating coercion] were not irrelevant,...neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court's finding that the Respondent voluntarily

consented to accompany the officers..."); *Florida v. Royer, supra,* at 507 ("the Florida District Court of Appeal cannot be faulted in concluding that the limits of a Terry-stop had been exceeded"); *Dunaway v. New York, supra,* at 207 (fn. 6) ("Respondent contends that Petitioner accompanied the police voluntarily and therefore was not seized.... The County Court found otherwise..."). *Cf. Florida v. Bostick, supra,* 115 L.Ed.2d at 400 ("Nevertheless, we refrain from deciding whether a seizure occurred in this case. The trial court made no express findings of fact, and the Florida Supreme Court rested its decision on a single fact — that the encounter took place on a bus — rather than on the totality of the circumstances).

Both the trial court and the Florida Supreme Court examined the totality of the circumstances of this encounter and rendered a judgment: Petitioner consented to accompany the police to the substation. The record is plainly adequate to support that judgment. Unless this Court merely wants to second-guess the evidence and the reasonable inferences to be drawn from that evidence, there is no reason to grant the writ based on Petitioner's claim of illegal arrest.

II

THE RECORD SUPPORTS THE FLORIDA SUPREME COURT'S DETERMINATION THAT PETITIONER CONSENTED TO SEARCH WHILE AT THE POLICE SUBSTATION

Petitioner's argument here depends primarily upon his claim that he was arrested illegally prior to consenting to search. As Respondent argues above, there is no reason to review the Florida Supreme Court's determination that there was no illegal arrest.

Moreover, Respondent would note that at the motion to suppress hearing, Petitioner did not argue that the prosecutor had any burden to establish "a break in the chain of illegality," as he now argues. Instead, he argued that the state had the burden to prove "voluntary" consent "beyond a reasonable doubt." (R 943). Thus, it is questionable whether he has even preserved the issue he raises here.[1] There is no definitive answer from the Florida Supreme Court on the preservation issue in this case, because it was not necessary to reach it; the Florida Supreme Court's agreement with the trial court's determination that Petitioner voluntarily went to the substation mooted any issue of any "break in the claim of illegality."[2]

As for the issue of voluntariness of the consent, respondent would note that it is unnecessary to speculate about or infer what Petitioner knew. By his own admission, Petitioner not only knew he had the right to refuse to consent to the search of his residence, he exercised that right by refusing to consent until the police agreed to his terms. The record shows that Petitioner was convinced the police could find nothing to connect him to the murder of Pauline Casey (R 3537, 3538, 3400); once he negotiated to his satisfaction about the only matter of concern to him (the guns in the house), he readily consented to its search.

Again, the record supports the judgment of the courts below, and there is no reason to grant the writ to second-guess those factual determinations.

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1 *See Peterka v. State*, 640 So.2d 59, 67 (Fla. 1994).

2 Respondent would note, however, that the trial court found that even if there was a nonconsensual trip to the substation, Petitioner's "conduct at the substation created a valid waiver." (R 838).

III

PETITIONER'S FRUIT-OF-THE-POISONOUS TREE WAS NOT REACHED BY THE COURT BELOW AND SHOULD NOT BE ADDRESSED IN THIS COURT.

Because the Florida Supreme Court did not find any illegal conduct by the police, it had no occasion to and did not address any fruit-of-the-poisonous-tree argument. Absent exceptional circumstances, this Court does not consider matters not decided by the court below. *Adickes v. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In any event, because no fruit-of-the-poisonous-tree issue can arise unless and until this Court concludes, contrary to the Florida Supreme Court, that Petitioner was illegally detained, this question does not establish an independent reason for granting the writ.

IV.

THERE IS NO REASON TO DEPART FROM THIS COURT'S TOTALITY-OF-THE-CIRCUMSTANCES APPROACH TO EVALUATING THE VOLUNTARINESS OF CONSENTS.

This court has "long approved consensual searches." *Florida v. Jimeno,* ___ U.S. ___, ___ S.Ct. ___, 114 L.Ed.2d 297, 302 (1991). The voluntariness of the consent is to be judged by the totality of the circumstances. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 227. Voluntariness does not turn "on the presence or absence of a single controlling criterion." *Id.* at 226. "The issue cannot be resolved by any infallible touchstone." *Id.* at 229. Hence, this Court specifically rejected in *Schneckloth* the suggestion that a subject of a search should be advised of his right to refuse consent before eliciting his consent. Noting that such suggestion

"has been almost universally repudiated by both federal and state courts, and, we think, rightly so," *id.* at 231, this Court observed that it would be "thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." Ibid. Later, in *U.S. v. Mendenhall, supra,* this Court reaffirmed that the voluntariness of a consent to search does not depend upon the subject having been informed of her right to decline to cooperate, *id.*, 446 U.S. at 555, but, rather, upon the "totality of all the circumstances." *Id.* at 557.

This Court has consistently eschewed rigid rules concerning all aspects of investigative stops. For example, in *U.S. v. Sharpe, supra,* this Court held: "Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." 470 U.S. at 685. A "per se rule" establishing time limits for a Terry stop, would be "fundamentally at odds with our approach in this area." *Id.* at 686.

In fact, the Florida Supreme Court has been reversed twice by this Court because it applied the kind of per-se rule that Petitioner now seeks. When the Florida Supreme Court applied a per-se rule that a consent to a general search for narcotics does not extend to sealed containers within the general area agreed to by the defendant, this Court reversed, "see[ing] no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness." *Florida v. Jimeno, supra,* 114 L.Ed.2d at 303. And in *Florida v. Bostick, supra,* this Court again reversed the Florida Supreme Court for applying a per-se rule prohibiting police searches on buses rather than basing its decision "on the totality of the circumstances." *Id.* 115 L.Ed.2d at 400.

Petitioner's proposed per se rule that police may not seek consent without first warning a subject that he is free to leave "fundamentally" conflicts with this Court's heretofore well-established approach in this area, and Petitioner has cited no case indicating any necessity for requiring the kind of warning he seeks here as a prerequisite to a valid consent.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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